IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

IN RE: GRAND JURY INVESTIGATION	)	
	)	
ANDREW MILLER,	)	
	)	
Appellant,	)	No. 18-3052
v.	)	
	)	
UNITED STATES OF AMERICA,	)	
	)	
Appellee.	)	

MOTION OF APPELLANT ANDREW MILLER TO STAY ISSUANCE OF THE MANDATE

Pursuant to Fed. R. App. P. 41(d)(1) and D.C. Cir. Rule 41(a)(2), Appellant Andrew Miller hereby moves this Court to stay issuance of the mandate for 30 days pending the filing of a petition for a writ of certiorari to the Supreme Court, and in support thereof, states as follows:

1. On February 26, 2019, this Court issued its opinion and judgment in this case affirming the district court's order of August 10, 2018, holding Mr. Miller in civil contempt for refusing to comply with a subpoena issued by Special Counsel Robert S. Mueller, III, to testify before the so-called Mueller Grand Jury on June 29, 2018. *In re: Grand Jury Investigation*, 916 F.3d 1047 (D.C. Cir. 2019).

2. The Court ordered the Clerk to "withhold issuance of the mandate herein until seven days after the disposition of any timely petition for rehearing or petition

for rehearing en banc." The Court's order further provided that, "This instruction to the Clerk is without prejudice to the right of any party to move for expedited issuance of the mandate for good cause shown." (Order, Feb. 26, 2019).

3. During the 45-day period following this Court's decision and order, the government failed to exercise its right to move for expedited issuance of the mandate, presumably because it could not show the requisite good cause.[1]

4. On April 12, 2019, Miller filed a timely Petition for Panel Rehearing and Rehearing *En Banc* with Suggestion of Mootness, which was denied on April 29, 2019.

5. Pursuant to the Court's order of February 26, 2019, referenced in para. 2, *supra*, and Fed. R. App. P. 41(b) and D.C. Cir. Rule 41(a)(1), the mandate is to be withheld for seven days from the denial of any timely petition for rehearing, which, in this case, is May 6, 2019, unless a motion to stay the mandate is filed on or before the seventh day after the denial of the rehearing petition. The instant motion to stay the mandate pending the filing of a petition for writ of certiorari is thus timely filed.

[1] According to Justice Department spokesperson Kerri Kupec, "The investigation is complete." Devlin Barrett and Matt Zapotosky, *"Mueller report sent to attorney general, signaling his Russia investigation has ended"* Washington Post (Mar. 22, 2019).

REASONS FOR GRANTING THE STAY OF MANDATE

Under Fed. R. App. P. 41(d)(1), a motion to stay the mandate pending the filing of a petition for writ of certiorari in the Supreme Court "must show that the petition would present a substantial question and that there is good cause of a stay." D.C. Cir. Rule 41(a)(2) provides that a stay of the mandate "will not be granted unless the motion sets forth facts showing good cause for the relief sought." While the Circuit Rule requires only that "good cause" be shown, whereas FRAP 41(d)(1) requires the showing of both "good cause" and that the petition "would present a substantial question," Appellant submits that his motion to stay the mandate satisfies both criteria.

1. This Case Presents Substantial Questions

To determine whether a petition for a writ of certiorari presents a "substantial question," this Court considers whether the petition "tenders [issues that] are substantial." *Deering Milliken, Inc. v. FTC*, 647 F.2d 1124, 1128 (D.C. Cir. 1978). Appellant intends to tender the following questions in his petition:

1. Whether Congress "established by law" the appointment of a private attorney to serve as a special counsel as an "Officer of the United States."

2. Whether Special Counsel Robert S. Mueller, III, was unconstitutionally appointed because he is a "principal officer" and thus was required to be—but was

not—appointed by the President with the Advice and Consent of the Senate under the Appointments Clause, Art. II, sec. 2.

3. Whether the Special Counsel was unconstitutionally appointed as an inferior officer under the Appointments Clause because he was required to be — but was not— appointed by then-Attorney General Jeff Sessions, the "Head of Department," rather than by Deputy Attorney General Rod Rosenstein.

There can be no doubt that the questions Appellant wishes to present to the Supreme Court in his petition are not only "substantial" but ones of exceptional importance. The Appointments Clause is "among the significant structural safeguards of the constitutional scheme." *Edmond v. United States*, 520 U.S. 651, 659 (1997). [2]

4. With respect to the underlying statutory question, the panel held that the issue of whether 28 U.S.C. 515 and 533(1) authorized the appointment of a Special Counsel was decided by the Supreme Court in *United States v. Nixon*, 418 U.S. 683 (1974) and this Court's decision in *In re Sealed Case*, 829 F.2d 50 (D.C. Cir. 1987). 916 F.3d at 1053. It did so without applying any of the well-settled rules of

[2] *See generally* Steven G. Calabresi & Gary Lawson, "*Why Robert Mueller's Appointment As Special Counsel Was Unlawful,"* Northwestern Public Law Research Paper No. 19-01 (last update Mar. 9, 2019) (forthcoming Notre Dame Law Rev.) https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3324631.

statutory construction employed by the Supreme Court and this Court. The panel cited to just *one sentence* in *Nixon* that Congress vested in the Attorney General "the power to appoint subordinate officers to assist him in the discharge of his duties. 28 U.S.C. 509, 510, 515, 533." *Id.* As amply demonstrated in our briefs, and which was undisputed, that fundamental statutory issue was neither briefed nor argued by the parties before the Court but instead was assumed. Given the Supreme Court's jurisprudence over the last 45 years since *Nixon* that Congress use clear statutory language when altering the structural safeguards of the constitution, *see e.g.*, *Gregory v. Ashcroft*, 501 U.S. 45 (1991), the Supreme Court will likely grant review to revisit its unexamined dictum, disguised as a holding by the panel, to ensure it was properly decided.

5. As for whether the Special Counsel, who has more power than U.S. Attorneys who have been appointed since 1789 by the President and confirmed by the Senate since 1789, should also be similarly appointed, the panel summarily declared that "[b]inding precedent instructs that Special Counsel Mueller is an inferior officer under the Appointments Clause." *Id.* at 1052. The "binding precedent" cited by the panel was *Edmond v. United States*, 520 U.S. 651, 663 (1997), for the proposition that any officer supervised by a superior officer appointed by the President and confirmed by the President is by definition an inferior officer. In doing so, the panel misapplied the three factors that need to be

considered in *Edmond* to determine whether an officer is inferior. *Id.* Yet as Justice Souter recognized in *Edmond*, "[i]t does not follow, however, that if one is subject *to some supervision and control*, one is an inferior officer. Having a superior officer is necessary for inferior officer status, but not sufficient to establish it." *Id*. at 667 (Souter, J., concurring in part and concurring in the judgment) (emphasis added). If that were the case, then every subcabinet officer is an inferior officer. Here, too, the Supreme Court would likely grant review and clarify the implication of its decision.[3]

6. The panel also relied on the widely discredited decision in *Morrison v. Olson*, 487 U.S. 654 (1988), *id.*, that the special counsel there was an inferior officer. But the source of powers of the special counsel in *Morrison* was based on clear statutory language in the Ethics in Government Act, and whose limited powers were miniscule and narrow in scope compared to Herculean and wide-ranging powers wielded by Special Counsel Mueller.

[3] *See* Brett M. Kavanaugh, *Symposium: The Independent Counsel Act: From Watergate to Whitewater and Beyond*, 86 Geo. L. J. 2133, 2147 (July 1988) ("a special counsel [should] be appointed in the manner *constitutionally mandated* for high-level executive branch officials: appointment by the President and confirmation by the Senate") (emphasis added).

7. Finally, the issue of whether the Special Counsel as an inferior officer should have been appointed by then-Attorney General Jeff Sessions, the Head of the Department as required by the Appointments Clause, instead of Deputy Attorney General Rod Rosenstein, is a substantial question that the Supreme Court will likely review in light of its recent jurisprudence that has demonstrated the Court's deep and profound concern that the appointment of inferior officers faithfully hew to the requirements of the Appointments Clause. *See, e.g., Lucia v. SEC,* 138 S. Ct. 2044 (2018).

2. Good Cause Exists to Stay the Mandate

If this Court finds that the petition for writ of certiorari presents at least one "substantial question," as movant submits that it clearly would, then "*resultantly,* [the Court] must conclude that there exists good cause to justify staying the mandate." *Milliken, supra,* at 1128 (emphasis added). In addition, Miller submits there are other "facts showing good cause" for granting a stay of the mandate. D.C. Cir. Rule 41(b)(2). Specifically, Miller submits that both the equities of the parties and interests of the public are additional "facts" that favor granting the stay of the mandate.[4]

[4] Indeed, "even [if the motion to stay the mandate] presents a weak case for a grant of certiorari, the equities of the situation counsel that the parties… [be] afforded an opportunity to present its contentions to the Justices of the Supreme Court of the United States." *Books v. City of Elkhart,* 239 F.3d 826, 829 (7th Cir. 2001).

1. If the stay of the mandate is not granted, Mr. Miller will be required to testify before the grand jury or be incarcerated while the petition is pending before the Supreme Court. The practical effect of this Hobson's choice – on the one hand, travel from St. Louis, MO to Washington, D.C., to testify before the grand jury, missing two days of work from his self-employed job as a painter/contractor to support his young family, and exposing himself to legal jeopardy and further litigation if any privilege is invoked; and, on the other hand, being incarcerated while his petition is pending – will effectively moot any petition for review in the Supreme Court. This showing of some harm to Mr. Miller constitutes "irreparable injury" if the stay is not granted.

2. Under D.C. Cir. Rule 41(b)(2), the stay of the mandate, if granted, would "ordinarily not extend beyond the 90 days from the date that the mandate otherwise would have issued." While Supreme Court rules of procedure allow a party 90 days within which to file a petition for writ of certiorari from the denial of a petition for rehearing, Sup. Ct. R. 13.1, Miller requests a stay of the mandate for only 30 days, or one-third of that allotted time, to obviate any objection by the government that it will be prejudiced by further delay of the mandate's issuance. This modest incremental delay will not prejudice the government considering the fact that the government did not seek to expedite this appeal from the time it was

filed on August 14, 2018, nor sought to expedite the issuance of the mandate after the Court's decision was rendered on February 26, 2019.

3. Moreover, the Special Counsel sought to obtain testimony from Mr. Miller, a former aide to Mr. Stone during the 2016 Republican National Convention, regarding his knowledge of Mr. Stone's connection with WikiLeaks, Julian Assange, Guccifer 2.0, and Russia. After Mr. Miller voluntarily submitted to a two-hour by FBI agents in St. Louis in May 2018, stating that he has no such knowledge and subsequently providing all documents that relate to those subjects, the Special Counsel indicted Roger Stone on January 24, 2019, charging him, *inter alia*, with providing false statements to Congress with respect to his contacts to Julian Assange and WikiLeaks and the hacking of Hillary Clinton and DNC emails. *United States v. Roger J. Stone, Jr.*, Crim. No. 19-CR-00018 (AGB) (D.D.C.). In short, either the government apparently has no genuine need for Mr. Miller's grand jury testimony or it will be not be prejudiced during a short stay of the mandate. Mr. Stone's trial is currently scheduled for November 5, 2019.

4. Additionally, any compelled appearance by Mr. Miller before the grand jury at this stage of the proceedings would violate Justice Department policy and relevant case law regarding the proper use of the grand jury:

> U.S. Attorney Manual **9-11.120 - Power of a Grand Jury Limited by Its Function**
>
> The grand jury's power, although expansive, is limited by its function toward possible return of an indictment. *Costello v. United States*, 350 U.S. 359, 362 (1956). Accordingly, the grand jury cannot be used solely to obtain additional evidence against a defendant who has already been indicted. *United States v. Woods*, 544 F.2d 242, 250 (6th Cir. 1976), *cert. denied sub nom*., *Hurt v. United States*, 429 U.S. 1062 (1977). Nor can the grand jury be used solely for pre-trial discovery or trial preparation. *United States v. Star*, 470 F.2d 1214 (9th Cir. 1972). After indictment, the grand jury may be used if its investigation is related to a superseding indictment of additional defendants or additional crimes by an indicted defendant. *In re Grand Jury Subpoena Duces Tecum, Dated January 2, 1985*, 767 F.2d 26, 29-30 (2d Cir. 1985); *In re Grand Jury Proceedings*, 586 F.2d 724 (9th Cir. 1978).

Accordingly, the proposed misuse of the grand jury to take Mr. Miller's testimony would be against the public interest.

5. Finally, the Supreme Court's resolution of the substantial questions that would be presented in a petition for writ of certiorari would also serve the public interest beyond the instant case, by definitively determining one way or another whether the appointment of Special Counsel Mueller -- and any future Special Counsels appointed under the current statutory scheme -- was lawfully authorized by Congress and complied with the Appointments Clause.

* * * * *

CONCLUSION

For the foregoing reasons, Appellant requests that this Court issue an order staying the mandate in this appeal for 30 days pending the filing of a petition for writ of certiorari to the Supreme Court of the United States.

Date: May 6, 2019

Respectfully submitted,

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CERTIFICATE OF SERVICE AND COMPLIANCE

Pursuant to FRAP 25(d), the undersigned hereby certifies that on the 6th day of May, 2019, he caused the foregoing Motion of Appellant Andrew Miller To Stay The Issuance of the Mandate to be filed electronically with the Clerk of the Court by using CM/ECF system. The participants in this case are registered CM/ECF users and service will be accomplished by the appellate CM/ECF system.

The undersigned further certifies that the foregoing Motion complies with FRAP 27(d)(2)(A) and contains 2,331 words, as determined by Microsoft Word 2010 and complies with FRAP 32(a) (5)-(6) because it has been prepared with proportionally spaced font typeface using Microsoft Word 2010 in 14-point Times New Roman.

/s/Paul D. Kamenar
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